

(1932) 11 PRI CK 0009

In the Privy Council

Case No : Privy Council Appeal No. 51 of 1930

Bhimabai Jivangouda Patil and another

APPELLANT

Vs

Gurunathgouda, Khandappagouda Patil

RESPONDENT

Date of Decision : 04-11-1932

Acts Referred:

Citation : (1933) AIR(PC) 1

Hon'ble Judges : Atkin Russell, John Wallis, Russell of Killowen, Atkin, Lords Blanesburgh, JJ.

Advocate : Jahagirdar, C.J. Colombos, A.M. Dunne, A.G. Desai, S.P. Khambatta, J.M. Parikh, L.De Gruyther, for the Appearing Parties.

Judgement

Sir Dinshah Mulla, J.

This is an appeal from the decree of the High Court of Judicature at Bombay, dated 28th February 1928, which affirmed the decree of the Court of the Joint First Class Subordinate Judge of Dharwar, dated 8th April 1925. The main question involved in the appeal is whether, according to the law prevalent in the Mahratta country of the Bombay Presidency, a Hindu widow, whose husband was undivided at the time of his death, and who has not the express permission of her husband, may adopt a son to him without the consent of the surviving coparceners. The parties are governed by the Mitakshara law, and on questions on which the Mitakshara is silent, by the law as expounded in the Vyavahara Mayukaha of Nilakantha. The following pedigree shows the relationship between the rival claimants:

The facts material to the appeal are no longer in controversy between the parties Dayamangouda and his three sons, Nilkanthagouda, Khandapagouda and Jivangouda, constituted a joint Hindu family. Dayamangouda died some years ago leaving him surviving his three sons. In 1895, Khandapagouda separated from the family, but the other two brothers continued to be joint. Khandapagouda died in 1912, leaving a widow who adopted the respondent as a son to him on 6th July 1915. Jivangouda died in 1913 leaving a widow, Bhimabai,

who is appellant 1 before this Board, and a daughter Tirkawa, but no male issue. On the death of Jivangouda his undivided interest in the joint family property passed to Nilkanthagouda by survivorship. On 20th May 1915, Nilkanthagouda, who had no male issue, took one Dyamangouda, who was then of the age of about 20 years, in adoption. On the same day Nilkanthagouda executed a writing purporting to be a deed of adoption in favour of Dyamangouda, which will be adverted to later. Nilkanthagouda died in December 1915, and on his death the joint family property passed by survivorship to Dyamangouda. Dyamangouda died in August 1919, leaving a widow Tungabai and a son Dattatraya, and the joint family property passed to Dattatraya by survivorship. Dattatraya was then about a year old, and Tungabai managed the property on his behalf.

On 17th September 1919, Bhimabai adopted appellant 2 as a son to her deceased husband Jivangouda. The adoption was not made under any express authority from her husband, nor was it made with the consent of Dattatraya who was then the sole surviving coparcener. Dattatraya, in fact, was a minor at that date, and incapable of giving his consent. It is the validity of this adoption that is in question in the appeal.

Dattatraya died a minor and unmarried on 6th February 1920. Shortly after his death, Tungabai delivered possession of the property to the respondent, purporting to do so under a consent decree in an arbitration proceeding between her and the respondent. Subsequently, on the application of the respondent, the Mamlatdar of Gadag ordered the property to be entered in his name in the record of rights as owner thereof, but the order was set aside by the Deputy Collector of Dharwar. Thereupon the respondent brought the suit out of which the present appeal arises in the Court of the Subordinate Judge of Dharwar against the first and second appellants, and three others who are not parties to the appeal. Therein he claimed a declaration that he was lawfully in possession of the property, and asked for an injunction restraining the defendants from interfering with his possession. The plaint alleged that the adoption of appellant 2 was not valid, and that the respondent was entitled to the property as the next heir of Dattatraya. The defence, so far as it is material to the appeal, was that, appellant 2 was validly adopted, and that he was entitled to the property by survivorship. The property is vatan land, and it was agreed that Tungabai had no interest in it. The Subordinate Judge held, following a Full Bench ruling of the High Court at Bombay in *Ishwar Dadu v. Gajabai*, AIR 1926 Bom 435=96 IC 712=50 Bom 468 (FB), that the adoption of appellant 2 was invalid, and passed a decree for the plaintiff. On appeal, the High Court at Bombay (consisting of Patkar and Baker, JJ.) confirmed the judgment of the Subordinate Judge, and passed a decree on 28th February 1928, dismissing the appeal with costs. It is against this decree that the present appeal has been brought to His Majesty in Council.

The question as to the validity of an adoption by a widow in a joint family was considered by the High Court at Bombay in *Ramji v. Ghamau*, (1879) 6 Bom 498 (FB), where it was held that an adoption by the widow of a deceased coparcener,

who had not her husband's express authority to adopt, was invalid, if made without the consent of the surviving coparceners. This case was considered by the Board in *Yadao v. Namdeo*, AIR 1922 PC 216=64 IC 536=48 IA 513=49 Cal 1 (PC). Four years later, the same question again arose in Bombay in *Ishwar Dadu v. Gajabai*, AIR 1926 Bom 435=96 IC 712=50 Bom 468 (FB), and it was referred to a Full Bench. It was argued in that case that *Ramji v. Ghamau*, (1879) 6 Bom 498 (FB) was overruled by the Board in *Yadao v. Namdeo*, AIR 1922 PC 216=64 IC 536=48 IA 513=49 Cal 1 (PC), and that the Board had in that case approved an earlier decision of the same High Court in *Rakhmabai v. Radhabai*, (1868) 5 Bom HC AC 181. The Full Bench however decided that *Ramji v. Ghamau*, (1879) 6 Bom 498 (FB) was still good law, and this was the ruling followed both by the Subordinate Judge and the High Court in the present case. The main question in this appeal is whether *Ramji v. Ghamau*, (1879) 6 Bom 498 (FB) was overruled in *Yadao v. Namdeo*, AIR 1922 PC 216=64 IC 536=48 IA 513=49 Cal 1 (PC) as contended by the appellants, or whether the observations of the Board with reference to that case were obiter dicta as is maintained for the respondent.

It will be convenient first to examine *Rakhmabai v. Radhabai* (4) and *Ramji v. Ghamau*, (1879) 6 Bom 498 (FB) and then consider whether *Ramji v. Ghamau*, (1879) 6 Bom 498 (FB) was overruled in *Yadao v. Namdeo*, AIR 1922 PC 216=64 IC 536=48 IA 513=49 Cal 1 (PC). In *Rakhmabai v. Radhabai*, (1868) 5 Bom HC AC 181, the suit was brought by the junior widow of a separated Hindu against the senior widow for possession of her equal half share in the estate of her deceased husband. The defendant in her written statement alleged that she had adopted a son to her husband, and contended that the adopted son was entitled to the entire estate. The adoption was made without (as it was found) the permission of her husband, and without the consent of his sapindas. Two questions were raised in the case, namely, (1) whether the adoption by the defendant, having been made without the permission of her husband and without the consent of his sapindas was valid; and (2) if so, whether a senior widow had power to adopt without the concurrence of the junior widow. The trial Judge passed a decree for the plaintiff. The defendant appealed, and the appeal was heard by Sir Richard Couch, C. J., and Newton and Warden, JJ. The learned Judges held that the adoption, though made without the permission of the husband and without the consent of his sapindas, was valid. They also held that a senior widow had power to adopt without the concurrence of the junior widow. The judgment of the Court was delivered by Sir Richard Couch.

On the first question, the learned Chief Justice observed that the Mitakshara was silent on the point, and that it was therefore necessary to resort to the Mayukha by which the parties were governed. He then quoted pl. 17 and 18, S. 5, Ch. 4 of the Mayukha, which relate to adoption by a widow, and considered the earlier Bombay decisions on the subject and the opinions of Pandits which had been given in those cases, and said:

?Upon the review which we have made of the authorities applicable in this part of

India, we are of opinion that in the Maratha country wherein the property in question in this suit is situate, a Hindu widow may, without the permission of her husband, and without the consent of his kindred, adopt a son to him, if the act is done by her in the proper and bona fide performance of a religious duty, and neither capriciously nor from a corrupt motive.?

The clause printed in italics represented the Madras view which was held in a later case to be inapplicable in Bombay: see *Ramchandra v. Mulji*, (1898) 22 Bom 558 (FB) (a) 7 Bom HC Appx xvii. Omitting that clause, the rest of the passage quoted above represents the construction put upon the Mayukha by the Court. The case, no doubt, was one of an adoption by a widow in a divided family, but it was not suggested there the Mayukha draws any distinction between an adoption by a widow in a divided family and an adoption by a widow in a joint family. In *Ramji v. Ghamau*, (1879) 6 Bom 498 (FB), the case which the appellants contend was overruled by the Board in *Yadao v. Namdeo*, AIR 1922 PC 216=64 IC 536=48 IA 513=49 Cal 1 (PC), the widow of a deceased coparcener adopted a son to her husband without his express permission and without the consent of the surviving coparceners. The case was heard by a Full Bench consisting of Sir Michael Westropp, C. J., and Melvill and Kemball, JJ. The learned Chief Justice, who delivered the judgment of the Court, said:

‘Accepting however the view which the cases seem to establish, viz., that the widow, where the husband dies separated, and she herself is the heir, or she and a junior widow are the heirs, may adopt without the sanction of the husband (if he have not expressly, or by implication, indicated his desire that she shall not do so), and without the sanction of his kindred, we are not as has been previously said in this Court, (a), disposed to carry the deviation from ordinary Hindu law further than it has been already established by precedents.’

The Court held that the decision in *Rakhmabai v. Radhabai*, (1868) 5 Bom HC AC 181 was confined to the case of an adoption by a widow in a divided family, and concluded that a widow, whose husband was undivided at the time of his death, and who has not his express authority to adopt, cannot make a valid adoption to him without the consent of his coparceners. It is nowhere suggested in the judgment that the construction put upon the Mayukho in *Rakhmabai v. Radhabai*, (1868) 5 Bom HC AC 181 was not correct.

Their Lordships will now proceed to consider whether *Ramji v. Ghamau*, (1879) 6 Bom 498 (FB), was disapproved by the Board in *Yadao v. Namdeo*, AIR 1922 PC 216=64 IC 536=48 IA 513=49 Cal 1 (PC). The family in that case was a joint family consisting of Pundlik, his cousin Namdeo, and Namdeo's two sons, Pandurang and Rambhau. Pundlik died childless in January 1905. In March 1905, his senior widow, Champabai, adopted Pandurang under an authority from him. That adoption was not disputed. In April 1905, Namdeo executed a deed of adoption in which he stated that he and Pundlik were members of a joint family, and that the adopted boy was ‘sole heir of half the entire property on the authority of the deed of adoption, and half the property belongs to me.’ The

deed further provided: "My half share in the moveable and immovable property may be kept as joint," if the widows of Pundlik approved. Pandurang died a minor and unmarried in 1907, and in 1908 Champabai adopted Yadao as a son to her husband without the consent of Namdeo. It was this adoption that was contested by Namdeo. Pundlik and his family had settled in the Central Provinces, but they were governed by the law applicable to Mahrattas in the Presidency of Bombay.

Subsequently, Yadao brought a suit for partition against Namdeo in the Court of the Additional District Judge at Akola. The trial Judge held that the adoption was valid, and made a preliminary decree for partition. Namdeo appealed to the Court of the Judicial Commissioner, Central Provinces, which allowed the appeal and dismissed the suit. The learned Judicial Commissioners held (as would appear from the record of the case printed for the Board), first, that the adoption had been prohibited by Pundlik, secondly, that the deed of adoption did not show that Pandurang had separated from Namdeo and Rambhau, and, lastly, that the family being still joint at the death of Pandurang, and the adoption having been made without the consent of Namdeo, it was invalid according to the ruling in *Ramji v. Ghamau*, (1879) 6 Bom 498 (FB). From that decree Yadao appealed to His Majesty in Council. Three points were argued before the Board on behalf of Yadao. First it was argued on the authority of *Rakhmabai v. Radhabai*, (1868) 5 Bom HC AC 181, that according to the law applicable to the parties, the widow had power to adopt to her husband without his permission and without the consent of his kinsmen, whether the husband was divided or undivided at the time of his death, and that the limitation sought to be imposed on that power, namely, that it could only be exercised when the estate was separate and vested in the widow, rested solely on the judgment in *Ramji v. Ghamau*, (1879) 6 Bom 498 (FB) and was not supported by any text or commentator. Next, it was argued that the adoption had not been prohibited by Pundlik either expressly or by necessary implication. Lastly, it was contended that if the widow's power depended upon the estate not being joint it was not joint at the time when the adoption was made, as a separation had already been effected by the deed of adoption. On the other hand, it was argued on behalf of Namdeo, that the adoption had been prohibited; that the deed of adoption neither effected nor evidenced a separation; and that in any case Pundlik having died joint, if at his death his widow had no power to adopt without his authority, the fact of a subsequent partition could not give her authority, and reliance was placed on *Ramji v. Ghamau*, (1879) 6 Bom 498 (FB).

The Board held that the deed of adoption showed that there was a separation between Pandurang and Namdeo, so that the estate of Pandurang passed to Champabai on his death as his heir. The Board also held that Pundlik had not prohibited the adoption. The estate being vested in her, and there being no prohibition to adopt, she was free to adopt another son to her husband without the consent of Namdeo, and she adopted Yadao. An adoption made in these circumstances was obviously valid, and required no further consideration. But

both sides invited the Board to decide whether, even if Pandurang had not separated from Namdeo, Namdeo's consent was necessary to the adoption, and this question was considered in the latter part of the judgment. The judgment of the Board on this part of the case begins with an examination of *Ramji v. Ghamau*, (1879) 6 Bom 498 (FB). The Board first stated what the question to be decided in that case was, and after quoting some passages from the judgment and commenting on them expressed its opinion thus:

?There does not appear to their Lordships to be any sound reason why in the Mahratta country of the Presidency of Bombay the Hindu law as to the power of a Hindu widow who has not the authority of her deceased husband to adopt a son to him, should depend on the question whether her husband had died as a separated Hindu or as an unseparated Hindu, or on the question whether the property which was vested in her when she made the adoption was or was not vested in her as his heir.?

Their Lordships are of opinion that in the passage quoted above the Board expressed its disapproval of the decision in *Ramji v. Ghamau*, (1879) 6 Bom 498 (FB). The Board then examined the judgment in *Rakhmabai v. Radhabai*, (1868) 5 Bom HC AC 181, and said:

?That decision was not based upon the fact that the deceased husband was a separated Hindu, nor was it based upon the fact that at the time of the adoption, the widow who made the adoption had vested in her the whole or any part of the property which had belonged to her husband. Their Lordships regard it as equally applicable to an adoption by a Hindu widow of the Mahratta country of the Province of Bombay, whether her husband at the time of his death was joint or separate, and whether his property was or was not vested in her as his heir at the time when she made the adoption, and consider that it is a decision to be applied in this appeal.?

This, their Lordships think, was a clear approval of the decision in *Rakhmabai v. Radhabai*, (1868) 5 Bom HC AC 181. In the result the Board held that the adoption of Yadao was valid. This conclusion was based on two grounds: (1) that there was a separation between Pandurang and Namdeo, in which case Champabai could undoubtedly adopt without the consent of Namdeo; and (2) that even if there was no separation, Champabai had the right to adopt Yadao without the consent of Namdeo.

Counsel for the respondent contended that the question at issue in *Yadao v. Namdeo*, AIR 1922 PC 216=64 IC 536=48 IA 513=49 Cal 1 (PC) did not turn on the actual decision in *Ramji v. Ghamau*, (1879) 6 Bom 498 (FB), but on a single passage in the judgment, that

?the widow of a Hindu dying without leaving any male issue, may if her husband were separated from his family in estate (or, in other words, where she is his heir), adopt without any express authority from him and without the consent of his relatives.?

He maintained that the whole question before the Board was whether Champabai, having the estate vested in her, not as her husband's heir, but as heir of her son, could make a valid adoption without the consent of Namdeo, and that the Board held that she could. Their Lordships are unable to adopt this view. The Court of the Judicial Commissioner had held that Pandurang having died undivided and his interest having passed by survivorship to Namdeo, the decision in *Ramji v. Ghamau*, (1879) 6 Bom 498 (FB) applied, and that the adoption having been made without the consent of Namdeo, it was invalid. The very first argument on behalf of Yadao, as appears from the report, was that *Ramji v. Ghamau*, (1879) 6 Bom 498 (FB) was wrongly decided, not that any particular proposition in it was incorrect, and *Rakhmabai v. Radhabai*, (1868) 5 Bom HC AC 181 was cited as laying down a rule of law directly contrary to the decision in *Ramji v. Ghamau*, (1879) 6 Bom 498 (FB). That is what was argued before the Board, and that is the argument that was accepted by the Board.

Counsel for the respondent also relied upon some passages in the judgments of the Board in the *Collector of Madura v. Mootoo Ramalinga*, (1868) 12 mia 397 (pc) and in *Sri Raghunadha v. Sri Brozo Kishoro*, (1876) 1 Mad 69=3 IA 154 (PC) in support of his contention that the Board could not have intended to overrule *Ramji v. Ghamau*, (1879) 6 Bom 498 (FB). In the *Collector of Madura v. Mootoo Ramalinga*, (1868) 12 mia 397 (pc) the Board held that in the case of an undivided family, the father of the husband was competent, by his sole assent, to authorize an adoption by a widow, and if the father was not then living

?the consent of all the brothers who, in default of adoption, would take the husband's share would probably be required, since it would be unjust to allow the widow to defeat their interest by introducing a new coparcener against their will.?

In *Sri Raghunadha v. Sri Brozo Kishoro*, (1876) 1 Mad 69=3 IA 154 (PC) a widow in an undivided family adopted without the consent of the husband's coparceners and with the consent of a distant and separated sapinda. The Board observed that

?there seem to be strong reasons against the conclusion that for such a purpose as that now under consideration, she can, at her will, travel out of the undivided family and obtain the authorization required from a separated and remote kinsman of her husband.?

The Board also observed that

?there are grave social objections to making the succession of property dependent on the caprice of a woman, subject to all the pernicious influence which interested advisers are too apt in India to exert over women possessed of or capable of exercising dominion over property,?

and that it was the duty of the Courts to keep the power strictly within the limits which the law had assigned to it. Now both these cases were from Madras and

according to the law as stated in the commentaries of that school, a widow, who has not the express authority of her husband, cannot adopt a son to him without the consent of his kinsmen. The commentaries however do not specify all the kinsmen. All that they say is that the consent to be obtained must be the consent of 'the husband's father, etc.' In both the cases the High Court at Madras considered that, in the absence of the husband's father, the consent of any kinsman was sufficient, but the Board intimated its dissent from that view. The Board held that the consent to be obtained, when the family was undivided must be the consent not of a separated kinsman who had no interest in the property, but of his (the husband's) coparceners to whom his interest had passed on his death by survivorship, and it was in this connexion that the observations of the Board quoted above were made. These observations cannot apply to an adoption by a widow in Bombay. The Mayukha and the Kaustubha, which govern the Mahratta school, regard adoption by a widow as a religious duty, which does not require the authority either of the husband or of his kinsmen. If no consent is required, no question of injustice or hardship to the kinsmen can arise.

For the reasons stated above, their Lordships are of opinion that *Ramji v. Ghamau*, AIR 1926 Bom 435=96 IC 712=50 Bom 468 (FB) was overruled by the Board in *Yadao v. Namdeo*, AIR 1922 PC 216=64 IC 536=48 IA 513=49 Cal 1 (PC) and that the opposite view taken by the Full Bench of the High Court at Bombay in *Ishwar Dadu v. Gajabai*, AIR 1926 Bom 435=96 IC 712=50 Bom 468 (FB) is wrong. Their Lordships may add that they agree with their predecessors that *Ramji v. Ghamau*, (1879) 6 Bom 498 (FB) was wrongly decided, and that the correct view of the law is that expressed in *Rakhamabai v. Radhabai*, (1868) 5 Bom HC AC 181. Their Lordships are therefore of opinion that the adoption of appellant 2 was not invalid on the ground that it was made by Bhimabai without the express permission of her husband and without the consent of the surviving coparcener.

It was pressed on their Lordships that *Ramji v. Ghamau*, (1879) 6 Bom 498 (FB) had been accepted and acted upon in the Presidency of Bombay since 1879, and that the decision should not be disturbed. But this is a belated appeal. It should have been made when *Yadao v. Namdeo*, AIR 1922 PC 216=64 IC 536=48 IA 513=49 Cal 1 (PC) was before the Board. *Yadao v. Namdeo* (3) was decided so far back as 1921, and if the High Court at Bombay, after that decision, followed *Ramji v. Ghamau*, (1879) 6 Bom 498 (FB), it was wrong in so doing. Their Lordships will now turn to the other contentions raised on behalf of the respondent. The first of these rests on the decision of the High Court at Bombay in *Chandra v. Gojarabai*, (1890) 14 Bom 463, and other cases following it. The question in that case was whether an adoption by the widow of a coparcener, after the death of the last surviving coparcener, and after the estate had vested in his widow or another person as his heir, was valid, and it was held that it was not. The reason for the decision was thus stated by Telang, J.:

?When the inheritance devolved from Nana the last surviving coparcener upon

his widow, it devolved, not by succession, as in an undivided family, but strictly by inheritance, as if Nana had been a separated householder. Strictly speaking, according to the view taken by our Courts, there was at Nana's death no undivided family remaining into which an adopted son could be admitted by virtue of his adoption.?

Relying on this decision, it was argued that the last surviving coparcener at the date of the death of Jivangouda was Nilkanthagouda, and that the adoption of appellant 2 having been made after the death of Nilkanthagouda, it was invalid. But Nilkanthagouda was not the sole surviving coparcener at the date of his death which, according to the decision cited above, would be the material date. Nor did the estate pass to Dayamangouda by inheritance as his heir. The coparcenary at the death of Nilkanthagouda consisted of himself and Dayamangouda, and the estate passed to Dayamangouda by survivorship. The adoption of appellant 2 was not made after the extinction of the coparcenary, but during its subsistence, the last surviving coparcener being Dattatraya. Their Lordships are therefore of opinion that the principle of the decision mentioned above does not apply. Another argument for the respondent against the validity of the adoption was that if the adoption of appellant 2 were upheld, the result would be that while a paternal grandmother could not adopt, a grandaunt could adopt. It is true that Nilkanthagouda having died leaving a son, and that son having himself died leaving a son, Nilkanthagouda's widow could not have adopted a son to her husband. But that is because her power to adopt came to an end the moment Dayamangouda died leaving a son : see *Ramkrishna v. Shamrao*, (1902) 26 Bom 526=4 Bom LR 315. It was not so in the case of *Bhimabai*. Her power to adopt, when she adopted appellant 2, had not come to an end; it was still subsisting. Their Lordships think that there is no force in this argument. The last argument for the respondent was founded on the deed of adoption executed by Nilkanthagouda in favour of Dayamangouda. The material portion of the document is as follows:

?So I have this day taken you in adoption according to our religion. (But the conditions that have been made are mentioned below :) "During my lifetime I alone am to carry on vahivat of my entire moveable and immovable property which has been in my possession from before the time of my taking you in adoption. You should live and be taken care of in my home. And after my death you should take my moveable and immovable property into your possession and should carry on vahivat thereof as a son born of my loins.?

It was argued for the respondent that on a true construction of this document, Dayamangouda did not take any interest in the property on adoption, that the property was given to him by way of gift which was not to take effect until after the death of Nilkanthagouda, and that all that Dayamangouda was entitled to during Nilkanthagouda's lifetime was maintenance. On this construction of the document, it was contended, that Dayamangouda did not enter the family as a coparcener, and that the coparcenary came to an end on the death of

Nilkanthagouda. Their Lordships do not think that that is the true meaning of the document. Dayamangouda was an adult at the date of adoption, and all that Nilkanthagouda intended to do by this writing was to exclude Dayamangouda from the possession and management of the property in his lifetime, and to retain sole control thereof in his own hands. In the result, their Lordships are of opinion that appellant 2 was validly adopted by Bhimabai as a son to her husband. Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed, that the decree of the High Court, dated 28th February 1928, and that of the Subordinate Judge, dated 8th April 1925, should be set aside, and that the suit should be dismissed. The respondent must pay the appellants' costs in the Courts below and before this Board.